

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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CLERK ALBUQUERQUE

BIVIAN B. RAMIREZ,

Petitioner,

v.

CIV NO. 05-768 JH/ACT

JOSE ROMERO, Warden, and
PATRICIA A. MADRID,

Respondents.

**MAGISTRATE JUDGE'S PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION ON PETITIONER'S POST JUDGMENT MOTIONS**

On December 30, 2005 United States District Court Judge Judith Herrera entered her Order and Judgment adopting the Magistrate Judge's Proposed Findings and Recommended Disposition. [Doc. No. 25]. In the Order, Judge Herrera overruled the Petitioner's Objections to the Proposed Findings, granted the Respondents' Motion to Dismiss the Application and denied the Application for the Writ of Habeas Corpus on the merits. On the same day, Petitioner filed his Second Motion to Vacate the Remainder of an Illegal Sentence. [Doc. No. 26]. Petitioner claimed that he had new evidence concerning House Bill 117 which made his sentence illegal. On January 12, 2006, Petitioner filed a Third Motion to Vacate the Remainder of an Illegal Sentence in which he raised the same argument as he had in the Second Motion. [Doc. No. 27].

The Federal Rules of Civil Procedure apply to proceedings brought under 28 U.S.C.

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§ 2254, the statute which governs petitions for the writ of habeas corpus brought by persons in state custody, as long as the Rules of Civil Procedure are not inconsistent with any statutory provision governing the writs. Rule 11, Rules Governing Section 2254 Cases in the United States District Court. Fed. R. Civ. P. 59(e) states that "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

Petitioner's Second Motion, filed on December 30, 2005, was filed within 10 days of the entry of Judgment. Petitioner's Third Motion, filed on January 12, 2006, was not filed within the requisite time. This Court has jurisdiction to recommend a ruling on Petitioner's Second Motion but not on Petitioner's Third Motion, although for all practical purposes, the issue is purely academic since the two motions raise the same argument and refer to the same evidence.

The Court will treat Petitioner's Second Motion to Vacate an Illegal Sentence as a Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59 (e) and will read the motion as one asking the Court to alter or amend the Order and Judgment entered of record December 30, 2005. Petitioner claims that he has "new" evidence showing that House Bill 117 purports to have amended the DUI statute under which Petitioner was sentenced, NMSA §66-8-102, making a sixth conviction for DUI a fourth degree felony, instead of a third degree felony. (Exhibit A to Petitioner's Second Motion to Vacate Sentence). The Court is unsure why Petitioner's Exhibit shows the language for House Bill 117 as making a sixth conviction for DUI a fourth degree felony, instead of a third degree felony, but suspects that the Exhibit Petitioner attached is a copy of the original bill as it was first introduced to the 2003 legislative session. House Bill 117 was amended before it was passed into law by the New Mexico Legislature.

The Court finds that Exhibit A to Petitioner's Second Motion to vacate Sentence is not a

true copy of the statute as it was passed by the 2003 legislative session. Laws 2003, Chapter 90, §3, the final version of House Bill 117, as amended, states "Upon a sixth conviction pursuant to this section, an offender is guilty of a third degree felony". The relevant language of House Bill 117, as amended, and codified as Laws 2003, Chapter 90, §3, is attached for Petitioner's convenience. Petitioner was convicted by the state court judge of a third degree felony and sentenced accordingly. Therefore, having found his purported evidence to be inaccurate, the Court also finds that Petitioner is not entitled to the relief he seeks, either the granting of his Application for the Petition of Habeas Corpus or a vacation of the remainder of his current sentence.

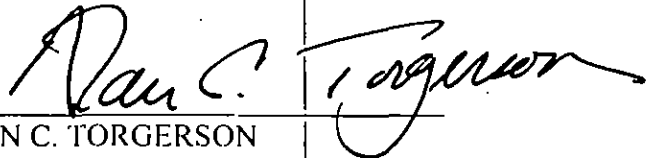
CONCLUSION

The Court recommends that the Petitioner's Second Motion to Vacate an Illegal Sentence, treated as a Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59 (e), the Judgment that denied his Application for a Writ of Habeas Corpus, be DENIED. Petitioner has failed to establish that he has new evidence that would establish that he is in custody pursuant to a State court judgment in violation of the Constitution of the United States.

NOTIFICATION

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN TEN (10) DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the United States District Court, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, pursuant to 28 U.S.C. §636 (b)(1). A party must file any objections within the ten (10) day period allowed if that party wants

to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

A handwritten signature in black ink, appearing to read "Alan C. Torgerson", is written over a horizontal line.

ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE

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Chapter 90

AN ACT

RELATING TO DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS; INCREASING PENALTIES FOR FELONY DWI OFFENDERS; MANDATING TREATMENT FOR PERSONS CONVICTED A SECOND OR THIRD TIME FOR DWI; REQUIRING THAT THE CORRECTIONS DEPARTMENT PROVIDE SUBSTANCE ABUSE COUNSELING AND TREATMENT TO FELONY DWI OFFENDERS; COMPLYING WITH FEDERAL LAW REGARDING PROHIBITED BLOOD OR BREATH ALCOHOL CONCENTRATIONS FOR COMMERCIAL DRIVERS; AMENDING AND REPEALING SECTIONS OF THE NMSA 1978; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 31-18-17 NMSA 1978 (being Laws 1977, Chapter 216, Section 6, as amended) is amended to read:

"31-18-17. HABITUAL OFFENDERS--ALTERATION OF BASIC SENTENCE.--

A. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by one year. The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless the court makes a specific finding that the prior felony

HJC/House Bill 117, as, w/ec
Approved March 28, 2003

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1 After disqualifying, suspending, revoking or canceling a
 2 nonresident commercial driver's privileges, the department
 3 shall, within ten days, notify the licensing authority of the
 4 state that issued the commercial driver's license.

5 I. For purposes of this section, the term
 6 "convicted" includes a license revocation pursuant to the
 7 Implied Consent Act or the implied consent act of another
 8 state."

9 Section 3. Section 66-8-102 MMSA 1978 (being Laws 1953,
 10 Chapter 139, Section 54, as amended) is amended to read:

11 "66-8-102. PERSONS UNDER THE INFLUENCE OF INTOXICATING
 12 LIQUOR OR DRUGS--AGGRAVATED DRIVING WHILE UNDER THE INFLUENCE
 13 OF INTOXICATING LIQUOR OR DRUGS--PENALTY.--

14 A. It is unlawful for a person who is under the
 15 influence of intoxicating liquor to drive a vehicle within
 16 this state.

17 B. It is unlawful for a person who is under the
 18 influence of any drug to a degree that renders him incapable
 19 of safely driving a vehicle to drive a vehicle within this
 20 state.

21 C. It is unlawful for:

22 (1) a person who has an alcohol
 23 concentration of eight one hundredths or more in his blood or
 24 breath to drive a vehicle within this state; and

25 (2) a person who has an alcohol

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concentration of four one hundredths or more in his blood or
breath to drive a commercial motor vehicle within this state.

D. Aggravated driving while under the influence of
intoxicating liquor or drugs consists of a person who:

(1) has an alcohol concentration of sixteen
one hundredths or more in his blood or breath while driving a
vehicle within this state;

(2) has caused bodily injury to a human
being as a result of the unlawful operation of a motor vehicle
while driving under the influence of intoxicating liquor or
drugs; or

(3) refused to submit to chemical testing,
as provided for in the Implied Consent Act, and in the
judgment of the court, based upon evidence of intoxication
presented to the court, was under the influence of
intoxicating liquor or drugs.

E. A person under first conviction pursuant to
this section shall be punished, notwithstanding the provisions
of Section 31-18-13 MSA 1978, by imprisonment for not more
than ninety days or by a fine of not more than five hundred
dollars (\$500), or both; provided that if the sentence is
suspended in whole or in part or deferred, the period of
probation may extend beyond ninety days but shall not exceed
one year. Upon a first conviction pursuant to this section,
an offender may be sentenced to not less than forty-eight

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1 hours of community service or a fine of three hundred dollars
 2 (\$300). The offender shall be ordered by the court to
 3 participate in and complete a screening program described in
 4 Subsection K of this section and to attend a driver
 5 rehabilitation program for alcohol or drugs, also known as a
 6 "DWI school", approved by the bureau and also may be required
 7 to participate in other rehabilitative services as the court
 8 shall determine to be necessary. In addition to those
 9 penalties, when an offender commits aggravated driving while
 10 under the influence of intoxicating liquor or drugs, the
 11 offender shall be sentenced to not less than forty-eight
 12 consecutive hours in jail. If an offender fails to complete,
 13 within a time specified by the court, any community service,
 14 screening program, treatment program or DWI school ordered by
 15 the court, the offender shall be sentenced to not less than an
 16 additional forty-eight consecutive hours in jail. Any jail
 17 sentence imposed pursuant to this subsection for failure to
 18 complete, within a time specified by the court, any community
 19 service, screening program, treatment program or DWI school
 20 ordered by the court or for aggravated driving while under the
 21 influence of intoxicating liquor or drugs shall not be
 22 suspended, deferred or taken under advisement. On a first
 23 conviction pursuant to this section, any time spent in jail
 24 for the offense prior to the conviction for that offense shall
 25 be credited to any term of imprisonment fixed by the court. A

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deferred sentence pursuant to this subsection shall be
 considered a first conviction for the purpose of determining
 subsequent convictions.

F. A second or third conviction pursuant to this
 section shall be punished, notwithstanding the provisions of
 Section 31-18-13 NMSA 1978, by imprisonment for not more than
 three hundred sixty-four days or by a fine of not more than
 one thousand dollars (\$1,000), or both; provided that if the
 sentence is suspended in whole or in part, the period of
 probation may extend beyond one year but shall not exceed five
 years. Notwithstanding any provision of law to the contrary
 for suspension or deferment of execution of a sentence:

(1) upon a second conviction, an offender
 shall be sentenced to a jail term of not less than ninety-six
 consecutive hours, forty-eight hours of community service and
 a fine of five hundred dollars (\$500). In addition to those
 penalties, when an offender commits aggravated driving while
 under the influence of intoxicating liquor or drugs, the
 offender shall be sentenced to a jail term of not less than
 ninety-six consecutive hours. If an offender fails to
 complete, within a time specified by the court, a community
 service program, a screening program or a treatment program
 ordered by the court, the offender shall be sentenced to not
 less than an additional seven consecutive days in jail. A
 penalty imposed pursuant to this paragraph shall not be

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1 suspended or deferred or taken under advisement; and

2 (2) upon a third conviction, an offender
3 shall be sentenced to a jail term of not less than thirty
4 consecutive days and a fine of seven hundred fifty dollars
5 (\$750). In addition to those penalties, when an offender
6 commits aggravated driving while under the influence of
7 intoxicating liquor or drugs, the offender shall be sentenced
8 to a jail term of not less than sixty consecutive days. If an
9 offender fails to complete, within a time specified by the
10 court, a screening program or a treatment program ordered by
11 the court, the offender shall be sentenced to not less than an
12 additional sixty consecutive days in jail. A penalty imposed
13 pursuant to this paragraph shall not be suspended or deferred
14 or taken under advisement.

15 G. Upon a fourth conviction pursuant to this
16 section, an offender is guilty of a fourth degree felony and,
17 notwithstanding the provisions of Section 31-18-15 MMSA 1978,
18 shall be sentenced to a term of imprisonment of eighteen
19 months, six months of which shall not be suspended or deferred
20 or taken under advisement.

21 H. Upon a fifth conviction pursuant to this
22 section, an offender is guilty of a fourth degree felony and,
23 notwithstanding the provisions of Section 31-18-15 MMSA 1978,
24 shall be sentenced to a term of imprisonment of two years, one
25 year of which shall not be suspended, deferred or taken under

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I. Upon a sixth conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of thirty months, eighteen months of which shall not be suspended, deferred or taken under advisement.

J. Upon a seventh or subsequent conviction pursuant to this section, an offender is guilty of a third degree felony and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a term of imprisonment of three years, two years of which shall not be suspended, deferred or taken under advisement.

K. Upon any conviction pursuant to this section, an offender shall be required to participate in and complete, within a time specified by the court, an alcohol or drug abuse screening program approved by the department of finance and administration and, if necessary, a treatment program approved by the court. The requirement imposed pursuant to this subsection shall not be suspended, deferred or taken under advisement.

L. Upon a second or third conviction pursuant to this section, an offender shall be required to participate in and complete, within a time specified by the court, not less than a twenty-eight-day inpatient, residential or in-custody